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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, *et al.*,
Petitioners,

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS ADMINISTRATORS OF TULANE EDUCATIONAL FUND AND INSTITUTES FOR BEHAVIOR RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Should this Court review the decision below to announce a new rule never articulated by any court that plaintiffs in cases removed to federal court pursuant to 28 U.S.C. § 1442(a)(1) do not have to satisfy Article III standing requirements?

2. Should this Court review the trial court's factual finding that Tulane was "a person acting under an officer of the United States" and that its acts were "under color of such office" when that finding was reviewed and approved by a Court of Appeals?

LIST OF PARTIES

Respondent Institutes for Behavior Resources, Inc. ("IBR"), formerly Institute for Behavioral Research, Inc., accepts petitioners' listing of the parties and notes that it is a not-for-profit District of Columbia corporation. IBR has no parents, subsidiaries or affiliates.

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Respondents, Administrators of Tulane Educational Fund ("Tulane") and Institutes for Behavior Resources, Inc. ("IBR"), respectfully request that the petition for writ of certiorari be denied.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers

and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

COUNTER STATEMENT OF THE CASE

A. Background

In 1981, Dr. Edward Taub, the chief of the Behavioral Biology Center of what is now called the Institutes for Behavior Resources, Inc. ("IBR"), was studying the capacity of monkeys to learn to use a limb after sensory nerves had been severed. Funded by the National Institutes of Health ("NIH"), the project amplified Dr. Taub's earlier research in this area and succeeded in discovering significant benefits for the rehabilitation of human patients suffering from serious neurological injury, such as stroke.

Plaintiff, Alex Pacheco, then an undergraduate student, who, unknown to Dr. Taub, had founded People for the Ethical Treatment of Animals ("PETA"), falsely claimed to be interested in a laboratory science career and offered to work as a volunteer for Dr. Taub at the IBR animal laboratory facility in Silver Spring, Maryland. Dr. Taub permitted Pacheco to work as a volunteer, and Pacheco came regularly to the laboratory during the summer of 1981. Pacheco caused the Montgomery County Police Department to charge Dr. Taub with animal cruelty under Section 59 of the Maryland Code.

The police obtained a search warrant from the Circuit Court for Montgomery County and on September 11, 1981, seized IBR's 17 monkeys used in Dr. Taub's experiments. Pursuant to court order the monkeys were returned to IBR. Subsequently, 17 criminal charges were filed against Dr. Taub alleging 119 violations of the Maryland animal cruelty statute.

On October 9, 1981, the Circuit Court for Montgomery County, without opposition from IBR, the owner of the monkeys, directed the monkeys' transfer to an NIH facility in Poolesville, Maryland. The order was to remain in effect "until further Order of this Court or the termination of the pending criminal prosecution against Dr. Taub, whichever occurs first".

Dr. Taub stood trial in November 1981 in the District Court for Montgomery County. After a bench trial, the court entered orders of conviction for failure to provide "necessary veterinary care" for six monkeys and acquitted Dr. Taub of the other 113 charges.

Fearing that the court order on custody of the monkeys would expire with an acquittal, PETA sought to prevent the return of any animals to IBR. The International Primate Protection League ("Primate League"), PETA and others filed a bill of complaint on December 3, 1981, in the Circuit Court of Montgomery County in which they purported to speak for "their own and class interests and as the next friends of seventeen (17) non-human primates". PETA alleged that a civil inquiry would demonstrate that IBR had violated the federal Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* PETA asked the court to designate it and the other plaintiffs as guardians of the monkeys, and to preclude IBR from regaining possession of them. *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d at 934, 936 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

On the basis of the federal question presented, NIH removed the case to the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. § 1441(b).

Dr. Taub appealed his six state court convictions to the Circuit Court for Montgomery County, Maryland, where a jury, after a "trial de novo," returned a guilty verdict against Taub on one count (failure to provide necessary veterinary care to one monkey). The Court of Appeals

of Maryland granted a writ of certiorari and reversed the conviction, holding that Article 27, Section 59 of the Maryland Code did not apply to IBR, an institution conducting medical research pursuant to a federal program. *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983).

After Dr. Taub was acquitted of all criminal charges, NIH continued to act as custodian of the monkeys with the consent of their owner, IBR.

B. The Appeal to the Fourth Circuit

In 1985, on motion of IBR, the Maryland federal district court dismissed the case for lack of standing on the part of the plaintiffs.

PETA (and the other plaintiffs) appealed the dismissal of their case to the Fourth Circuit. (While the appeal was pending, NIH transferred the remaining 15 monkeys to the Delta Regional Primate Research Center in Covington, Louisiana. Five of the monkeys, which had not been surgically altered, were later transferred to the San Diego Zoo. For the care of the surgically altered animals, and one control animal, NIH entered into a contract with Tulane University through its School of Medicine ("Tulane"), which operates the Delta Center. Under the contract, the Delta Center assists NIH in its role as custodian of the monkeys.)

In 1986, the Fourth Circuit affirmed the district court's dismissal of the complaint, stating in part:

> In this case we must decide whether a group of private individuals may challenge a medical researcher's compliance with federal standards for the care of laboratory animals. *Because we find that the plaintiffs lack standing to bring such a lawsuit, we affirm* the judgment of the district court in its dismissal of this action.
>
> To imply a cause of action in these plaintiffs might entail serious consequences. It might open the use of

> animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be ill-advised. ***In fact, we are persuaded that Congress intended that the independence of medical research be respected and that the administrative enforcement govern the Animal Welfare Act.*** 799 F.2d at 935 (emphasis added).

PETA's petition to the Supreme Court of the United States for a writ of certiorari was denied in 1987. 481 U.S. 1004 (1987).

C. Prior Proceedings in Louisiana

In 1988, based on the recommendation of a panel of independent experts in veterinary care, primate behavior, and neurology, NIH determined that three of the monkeys should be euthanized because of the amount of distress they were experiencing. Plans were made to euthanize them humanely on December 28-31, 1988. In furtherance of its statutory research mission, NIH hoped to gain, through the autopsy of the animals, knowledge that might lead to improvements in rehabilitation therapy for individuals who have suffered brain or spinal cord damage. *See International Primate Protection League* v. *Tulane Educational Fund*, 895 F.2d 1056, 1058 (5th Cir. 1990).

To preclude the euthanasia and experimentation, on December 28, 1988, PETA, Primate League and others filed suit in the Civil District Court for the Parish of Orleans in the State of Louisiana, again seeking custody of all the surviving Silver Spring Monkeys, and injunctive relief against the named defendants, the Administrators of the Tulane Educational Fund, the National Institutes of Health, and the Institutes for Behavior Resources, Inc.

The Louisiana state court issued a temporary restraining order against Tulane, the only party then served.

The United States Attorney on behalf of NIH removed the case, under the authority of 28 U.S.C. § 1442(a)(1), to the United States District Court for the Eastern District of Louisiana. After the removal, petitioners moved for and secured a temporary restraining order.

The Court of Appeals for the Fifth Circuit concluded that the removal was proper, the federal interest was adequately established, and that petitioners did not meet the standing requirement of Article III. Accordingly, the Fifth Circuit vacated the district court order and dismissed the entire case. *IPPL* at 1058-61 (1990).

After a motion by plaintiffs to Stay the Mandate was denied, on July 6, 1990, NIH performed the euthanasia and the experimental protocol on the three monkeys. Earlier, another monkey had been euthanized and two had died.

On November 26, 1990, this Court granted Plaintiffs' Petition for a Writ of Certiorari. However, review was limited to the first question presented; namely, the propriety of the removal of the case by NIH from the state court to the federal court.

In January 1991, the health of two of the monkeys, Titus and Allen, deteriorated. As a result, NIH decided to euthanize the two animals.

This decision by NIH was based both on a concern for the monkeys' welfare and the significance of the experimental protocol. The monkeys had great scientific value because of the long period of time they had spent in a deafferented state and the comparatively large portions of their bodies that had been deafferented. NIH expected that the experimentation following euthanasia would significantly aid efforts to promote recovery in persons with neurological damage. However, that data would be irretrievably lost if the monkeys expired before

the euthanasia could begin, or if they did not remain stable enough to undergo the experimental process. NIH advised counsel for plaintiffs of its decision and the reasons for it on April 8, 1991.

D. Proceedings in the Supreme Court

On April 8, 1991, plaintiffs, in an effort to preclude any experiments on the monkeys, moved the district court for a "restoration of [its] injunction". The district court denied plaintiffs' motion.

On the same day, April 10, plaintiffs sought the same relief they had sought in the district court, in the Fifth Circuit and in the Supreme Court of the United States. On the evening of April 10, 1990, Justice Kennedy entered an order directing the recall of the Fifth Circuit's mandate, enjoining NIH and Tulane from performing the planned euthanasia and directing the Solicitor General to file a response.

After receiving briefs in opposition from NIH and IBR, this Court denied plaintiffs' motion on April 12, 1991. The euthanasia and terminal experiments on the two primates were completed promptly thereafter.

Data obtained from these experiments were published in prestigious scientific journals. *See, e.g.*, Pons, *Massive Cortical Reorganization After Sensory Deafferentation in Adult Macaques, Science* (vol. 252, pp. 1851-56 (1991)).

On May 20, 1991, the Supreme Court held that the removal by NIH from state court to federal court was improper and directed a remand to the Civil District Court for the Parish of Orleans, Louisiana. In Footnote 4 of its opinion, the Supreme Court stated in part:

> Our grant of certiorari did not extend to the Court of Appeals' determination that petitioners lacked standing to protect the monkeys. We therefore leave open the question whether a federal court in a § 1442(a)(1) removal case may require plaintiffs to

> meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises pendent jurisdiction.

International Primate Protection League v. *Administrators of Tulane Educational Fund*, 500 U.S. 72, 111 S. Ct. 1700, 1705 n.4 (1991).

The Court also stated:

> "(W)hether Tulane will be able to remove the remanded case requires a determination whether it is a 'person acting under' the Director of N.I.H. within the meaning of 1442(a)(1). This mixed question of law and fact should not be resolved in the first instance by this Court, least of all without an appropriate record". *Id.* at 1710.

E. Proceedings After the Supreme Court Decision

After the remand to state court, Tulane removed the action to the federal district court under § 1442(a)(1) as a "person acting under" an officer of the United States. The district court granted a motion by the plaintiffs to remand the case to state court, whereupon Tulane filed a petition for a Writ of Mandamus with the Fifth Circuit seeking to reverse the district court's remand order.

The Court of Appeals concluded that the district court did not base its remand on jurisdictional grounds and that, accordingly, the Court of Appeals had jurisdiction to review the remand order.

In vacating the remand order, the Fifth Circuit in the mandamus action stated in part:

> "That the Supreme Court declined to speculate on whether Tulane is a 'person acting under' the Director of NIH within the meaning of § 1442(a)(1) on the record before it, does not mean that the district court may remand these issues to the state court. Although it is not perfectly clear to us that *any* interpretation of state law is necessary, even if it is,

> a district court does not enjoy the luxury of remanding a case to a state court to interpret state laws or to make a record. The district court must decide for itself whether Tulane satisfied the two requirements of § 1442(a)(1), *i.e.*, that Tulane is a 'person acting under' an officer of the United States and that its acts are 'under color of such office'. *See* James Wm. Moore and Brett A. Ringle, 1A Moore's Federal Practice ¶ 0.164[2] at 398 (Matthew Bender, 1991). (emphasis supplied).
>
> We conclude that the district court expressly and affirmatively based its decision to remand on non-§ 1447(c) grounds. We therefore have jurisdiction to review the remand order under the Thermtron exception to § 1447(d). We conclude that the petition has merit. Accordingly, we GRANT the petition for mandamus and VACATE the remand order."

After the remand order was vacated the parties engaged in extensive discovery, both on the merits and on the jurisdictional issues. Depositions were taken, documents produced, interrogatories were propounded and answered.

Defendants then moved for summary judgment. The district court in its decision granting the motion referred to parts of the record it reviewed. *See* Pet. App. A-7. The Court concluded:

> "On that basis, the Court finds sufficient facts have now been submitted to establish that Tulane satisfies the two requirements of [1442](a)(1), namely that, at all material times, Tulane was and is a 'person acting under' the Director of the NIH, an officer of the United States, and that its acts are 'under color of such office'. Accordingly, Tulane's removal under [1442](a)(1) was proper and this Court has jurisdiction over this case and controversy".

The Court of Appeals agreed that Tulane, a corporate entity, was a "person" within the meaning of § 1442 (a)(1). Pet. App. A-2.

In reviewing the trial court's determination that Tulane was "acting under" a federal officer, the Court of Appeals reviewed the trial court's "findings of fact relating to the jurisdictional issues for clear error". *Id.* at A-3. The standard of review issue was the subject of supplementary post oral argument briefing. *See* Respondents' App. A-1.

Relying in part on the letter agreement between Tulane and NIH, and the central role of NIH officials, the Fifth Circuit concluded that it could not say that the trial court "clearly erred". Pet. App. A-3.

REASONS FOR DENYING THE WRIT

I. PETITIONERS, WITHOUT ANY LEGAL BASIS, CONTEND THAT AS PLAINTIFFS THEY DO NOT HAVE TO ESTABLISH THEIR OWN ARTICLE III FEDERAL COURT STANDING BECAUSE, PRIOR TO THE REMOVAL BY TULANE, THEY ASSERTED EXCLUSIVELY STATE LAW CAUSES OF ACTION IN STATE COURT. ARTICLE III STANDING REQUIREMENTS, THEY INCORRECTLY CONTEND, ARE SATISFIED BY THE ASSERTION OF A FEDERAL DEFENSE IN THE REMOVAL PETITION FILED BY TULANE IN ACCORDANCE WITH 28 U.S.C. § 1442(a)(1).

1. This is a different argument than the one Petitioners made to the district court where they asserted that "plaintiffs can satisfy the standing requirements of either state or federal court". Memorandum in Opposition to Defendants' Motion for Summary Judgment, at 72 (Oct. 21, 1992). Plaintiffs below also contended that the first Fifth Circuit decision was erroneous in concluding that plaintiffs had not established federal court standing. Pet. App. 11.

2. The argument, upon which Petitioners relied in the Court of Appeals—that as plaintiffs asserting exclusively state law causes of action their lack of federal court standing is irrelevant—ignores the purpose of Article III, which

requires that parties seeking affirmative relief must always establish their federal court standing.

As stated in Stern and Gressman, *Supreme Court Practice,* 707 (6th ed.), to satisfy Article III a plaintiff must establish: 1) that he personally suffered some actual or threatened injury, 2) that the injury can be traced to the action of the defendant, and 3) that the injury can be redressed by a favorable decision.

Stern and Gressman also summarize the "prudential considerations" supplementing the Article III standing requirements "directed toward avoiding unnecessary and inappropriate constitutional adjudications". *Id.* at 708. They point out that "in state court cases, the Court is not bound by the state law of standing * * * for the Article III concerns are particularly federal in nature". *Idem.* Stern and Gressman also cite *Waller* v. *Georgia*, 467 U.S. 39, 43 n.3 (1984) for the proposition that "state court standing determination is not controlling as to the Supreme Court's duty to avoid advisory opinions". Stern and Gressman, *id.* at 709. These constitutional and prudential considerations are, or course, equally applicable to United States District Courts and Courts of Appeal.

The Constitution of the United States in Article III thus confines the federal judiciary to deciding "cases and controversies". If a plaintiff were not required to establish his own standing, there would be no means to insure that the "case or controversy" requirement is satisfied. The removal by the federal officer, or person acting under him, though providing federal question jurisdiction, does not speak to the standing issue.

3. Were Petitioners' novel and unsupported constitutional interpretation accepted, i.e., that plaintiffs in cases filed in state court under state law and removed to federal court pursuant to § 1442(a)(1) by virtue of federal officer involvement or direction need not establish

federal court standing, the jurisdiction and case load of the federal courts would be radically expanded.

If Petitioners' approach were implemented, any law school student in the United States could file suit in state court against a federal government officer, attacking under state law federal government policies he found objectionable. The removal petition and the officer's assertion of a federal defense would, in Petitioners' view, satisfy Article III—even if the law student had no personal stake in the litigation. In such circumstances, though the federal court would have jurisdiction to hear the federal defense, the "case or controversy" requirement of Article III would not have been satisfied. Without a direct personal stake on the part of the hypothetical law school student plaintiff, there would not be a "case or controversy" because the law student lacked standing to challenge government policy.

Petitioners advocate a pernicious doctrine of constitutional interpretation which could cause great mischief in federal courts.

4. An additional weakness in Petitioners' novel theory is that "the removal statute merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged". *Mesa* v. *California,* 489 U.S. 121, 136 (1989). Federal officer removal cases are, nevertheless, cases arising under "the laws of the United States" for Article III purposes. Are Petitioners by implication contending that federal question removals under 28 U.S.C. § 1441(b) can go forward even if the plaintiff lacks Article III standing?

In a federal-question removal, the federal issue must appear on the face of a well-pleaded complaint. In federal-officer removals, the federal issue is asserted defensively in the removal petition. However, either form of federal question case can call into question important federal government programs. On what conceivable basis

should the standing requirement apply only when the federal question is asserted offensively, but be waived in cases when it is asserted defensively? Petitioners might just as well assert that in all federal-question litigation the presence of the federal issue, however asserted, satisfies Article III—even in the absence of a plaintiff with a personal stake in the litigation sufficient to create a case or controversy.[1]

Nor would it make sense for a federal court to hear state law claims in the absence of a plaintiff with Article III standing in *federal-officer* removal case (as Petitioners advocate), when such pendent state law claims cannot, in

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[1] The federal officer removal statute is not the only instance in which the federal basis for removal need not appear on the face of the complaint but can be established in the removal petition. For example, chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201-08 (1982 ed.), provides in section 205:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. *The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.* For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed. (Emphasis supplied.)

Were Petitioners' arguments to be accepted the removal petition itself would establish Article III standing requirements even if the state court plaintiff lacked any economic interest in the international contract containing the arbitration clause. If this is not the implication of Petitioners' argument, on what conceivable basis should standing requirements be different for cases removed from state court to federal court under 28 U.S.C. § 1442(a)(1) rather than 9 U.S.C. § 205? Clearly, in both instances the removal to federal court does not establish that there is a case or controversy.

the absence of standing, be heard in *federal-question* removal cases.

In 1981, Petitioners (PETA and International Primate Protection League) sued Respondents (National Institutes of Health and Institutes for Behavior Resources) in a Maryland state court, asserting claims under the federal Animal Welfare Act with respect to the same Silver Spring Monkeys at issue in this case. As plaintiffs therein they also asserted pendent state law causes of action. The case was removed to federal district court on the basis of federal-question jurisdiction. A motion to dismiss for lack of standing was granted. The Court of Appeals for the Fourth Circuit upheld the dismissal of the federal claims because the plaintiffs lacked standing. *International Primate Protection League* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

The Fourth Circuit also dismissed the pendent state law claims, holding that "without a justiciable case or controversy, federal courts cannot address claims of state law". *Id.* at 941.

It would indeed be anomalous if essentially the same state law claims in federal-question cases were to have different standing requirements, depending on whether the removal was based on a *federal question* (as in the Fourth Circuit case), or removal on the basis of *federal officer* involvement, as in this case. Yet this is the result Petitioners advocate.

5. Petitioners seek to impart an aura of respectability to their argument by suggesting that there is treatise and case law support for their theories. At pages 11-12 of the Petition, they state:

> "For this reason, Wright, et al. have opined that where questions of state law are presented to federal courts, state standing law applies. 13A *Federal Practice and Procedure: Jurisdiction* 2d § 3531.14 at 84.

> See also, *Ferency* v. *Austin*, 493 F. Supp. 683, 690 (W.D. Mich. 1980)".

Neither of the two cited authorities remotely supports Petitioners' contention that the plaintiffs' lack of standing can be ignored in federal officer removal cases.

Wright and Miller state in 13A *Federal Practice and Procedure*: *Jurisdiction* 2d § 3531.14 that "standing in federal court is a matter of federal law". They also state in the same section:

> "Of course, state rules that recognize standing need not be honored if Article III requirements are not met". p. 91.

Nowhere do Wright and Miller say or suggest that, in federal officer removal cases, the plaintiff does not have to establish Article III standing.

Nor does the district court case of *Ferency* v. *Austin*, 493 F. Supp. 683, 690 (W.D. Mich. 1980) support Petitioners' assertions.

Ferency was not a federal officer removal case under 28 U.S.C. § 1442(a)(1). It was a run-of-the-mill federal question removal under 28 U.S.C. 1441(b). The case was an attack on the State of Michigan's election law as applied to the Democratic party. Violations of the United States Constitution were alleged in the complaint and the defendant removed on that basis.

The defendant argued that Ferency did not have state court standing under the Michigan APA. This was a critical issue because if the state court lacked jurisdiction, which it would if Ferency lacked state court standing, the federal court could not acquire jurisdiction by virtue of the removal, even if it would have had original jurisdiction of such an action. Wright and Miller, *Federal Practice and Procedure*, Removal from State Courts, § 3722.

There is not the slightest suggestion that if Ferency had state court standing, he would not also be required to establish federal court Article III standing. Such a standing requirement was assumed, but not even discussed in this opinion.

Nor does the case of *Asarco, Inc.* v. *Kadish,* 490 U.S. 605 (1988) advance Petitioners' argument. Though the state court plaintiffs lacked federal court standing, a case or controversy developed in the process of state court adjudication. Thus the original defendants acquired standing to invoke the jurisdiction of the Supreme Court. There is no suggestion in *Asarco* that federal court standing requirements can be waived for select classes of claimants. Indeed the *Asarco* court stated,

> "We determined that the Petitioners have standing to invoke the authority of a federal court and that this dispute now presents a justiciable case or controversy for resolution here. * * * We also conclude that the record shows the existence of a genuine case or controversy essential to invoke exercise of the jurisdiction of this court." *Id.* at 618-19.

6. Petitioners' argument that "the imposition of Article III requirements on state law claims" is improper, and serves no federal purpose, suggests that the import of their argument is that federal court standing should not even be required of plaintiffs in diversity cases, either filed in a district court pursuant to 28 U.S.C. § 1332 or removed to a federal court pursuant to 28 U.S.C. § 1441(a).

Since *Erie Railway Co.* v. *Tomkins,* 304 U.S. 64, 68 (1938), in diversity cases "the law to be applied in any case is the law of the state". Though a federal forum is provided to diverse litigants as it is to federal question litigants, that does not mean that federal constitutional principles are superseded. As the *Erie* court noted, the application of state law applies "except in matters gov-

erned by the Federal Constitution or by Acts of Congress". *Idem.*

It is clear, however, that federal court diversity litigants must satisfy federal court standing requirements if they are to assert their state law causes of action in federal court. There is no apparent reason to require federal court standing for diverse litigants asserting causes of action under state law, whose actions are removed to federal court by reason of diversity jurisdiction, but to waive that standing requirement for state court litigants similarly asserting state law causes of action, whose cases are removed to federal court by federal officers, or those acting under them, because of the existence of a federal defense.

There is no reason for this Court to review the decision below to establish a hitherto unknown exception to federal court standing requirements—either limited to federal-officer removal cases, or more expansive. This is the identical complaint that was previously before this Court when the standing issue was not deemed suitable for review. Though in Footnote 4 of its 1991 opinion this Court left open the question of whether in federal-officer removal cases plaintiffs may be required to meet federal court standing requirements with respect to their state law claims, that issue was neither decided nor considered in depth. No court has ever held that there is an exception to the federal standing requirement in federal-officer removal cases. In the absence of a single authority supporting Petitioners, there is no reason to dignify Petitioners' contentions by granting review of the decision below.

II. THE "LAW OF THE CASE" RULE WAS PROPERLY APPLIED.

This Court in *IPPL*, 111 S. Ct. at 1710, reversed but did not vacate the first Fifth Circuit opinion; this Court directed a remand to state court. Certiorari had not been granted on the standing issue. *Id.* at 1705 n.4.

When after the remand to state court, and Tulane's removal to federal court, the district court judge properly concluded that, were the Fifth Circuit to review the identical complaint for the second time, there was no reason to believe that the Court would rule differently on the standing issue. Pet. App. A 10-11. Inasmuch as the removal under 28 U.S.C. § 1442(a)(1) by Tulane had been upheld, plaintiffs' lack of federal court standing required dismissal, not a remand. *Cf. Maine Assn. of Independent Neighborhoods* v. *Commissioner*, 876 F.2d 1055 (1st Cir. 1989). The district court judge accordingly granted summary judgment dismissing the case. Pet. App. 11.

The Court of Appeals under *Falcon* v. *General Tel. Co.*, 815 F.2d 317, 319-20 (5th Cir. 1987), followed the previous panel's ruling on the standing issue. As *Falcon* notes, the law of the case doctrine "is not an inexorable command by a rule of practice limited in scope" and with a number of exceptions. *Id.* at 320. If any of the exceptions had been applicable, the panel would have been free to reexamine the standing issue; though, if they had, there is no reason to believe that they would have decided differently. In any event, the invocation of the "law of the case" rule, to follow a previous panel's decision on standing with respect to the identical petition and parties, was proper. Indeed, there was no reason for the Court to revisit the issue of whether or not Petitioners had federal court standing because Petitioners were no longer contending that they had standing, but rather that they did not need standing at all. The latter argument was not accepted.

III. THE COURT OF APPEALS PROPERLY APPLIED THE "CLEAR ERROR" STANDARD IN REVIEWING THE TRIAL COURT'S FACTUAL DETERMINATION THAT TULANE WAS "ACTING UNDER" A FEDERAL OFFICER, AND THUS ENTITLED TO REMOVE THE CASE TO FEDERAL COURT.

When this case was last before this Court, the removal issue was considered but not resolved. As noted above, this Court stated:

> "(W)hether Tulane will be able to remove the remanded case requires a determination whether it is a 'person acting under' the Director of N.I.H. within the meaning of 1442(a)(1). This mixed question of law and fact should not be resolved in the first instance by this Court, least of all without an appropriate record." *IPPL*, 111 S. Ct. at 1711.

Following the remand to state court, Tulane, as contemplated, removed the case to federal court.

Thereafter, as previously noted, the parties engaged in extensive discovery, both on the merits and the jurisdictional issues. Depositions were taken, documents produced, and interrogatories propounded and answered.

Discovery came to a halt when the principals of Petitioner PETA refused to answer discovery deposition questions, on the ground that they might incriminate themselves with respect to their association with a known terrorist organization. They asserted that various federal grand juries were looking into possible RICO violations on their part.

Fortunately, a sufficient record had at that point been developed to permit the defendants to move for summary judgment on the standing issue, and to flesh out the factual basis for the Tulane removal petition.

The district court in its decision referred to portions of the record it reviewed. Pet. App. A-7. The Court concluded:

> "On that basis, the Court finds sufficient facts have now been submitted to establish that Tulane satisfies the two requirements of [1442](a)(1), namely that, at all material times, Tulane was and is a 'person acting under' the Director of the NIH, an officer of the United States, and that its acts are 'under color of such office'. Accordingly, Tulane's removal under [1442](a)(1) was proper and this Court has jurisdiction over this case and controversy".

The Court of Appeals agreed that Tulane, a corporate entity, is a "person" within the meaning of § 1442(a)(1). Pet. App. A-2. The result is consistent with, if not compelled by, the Dictionary Act, 1 U.S.C. 1. No court of appeals has ever held that a corporation cannot be a person under 1442(a)(1), and the cases are legion in which corporations have removed cases under 1442(a)(1) as "a person" acting under a government officer. *See, e.g., Peterson* v. *Blue Cross/Blue Shield of Texas,* 508 F.2d 55, 58 (5th Cir. 1974), *cert. denied,* 422 U.S. 1043 (1975). *Texas* v. *National Bank of Commerce of San Antonio,* 290 F.2d 229, 231 (5th Cir. 1961), *cert. denied,* 368 U.S. 832 (1961); *Camacho* v. *Autoridad de Telephonos de Puerto Rico,* 868 F.2d 482, 486 (1st Cir. 1989).

In reviewing the trial court's determination that Tulane was "acting under" a federal officer, the Court of Appeals reviewed the trial court's "findings of fact relating to the jurisdictional issues for clear error". *Id.* at A-3. The standard of review issue was the subject of supplementary post oral argument briefing. *See* Respondents' App. A-1.

Relying in part on the letter agreement between Tulane and NIH, and the central role of NIH officials, the Fifth Circuit concluded that it could not say that the trial court "clearly erred". Pet. App. A-3. Petitioners make a generalized objection to the factual determination by the district court, but none of this comes close to rising to the level of "clear error".

Nor is such a factual determination, approved by two courts, a suitable subject for review by this Court. As stated in Stern and Gressman, *supra,* at 217-18:

> "The Court is even less likely to take a case to review a factual issue—or to reverse on such an issue if certiorari is granted for some other reason—where the findings of fact made by the district court receive the concurrence of the court of appeals. In that situation the Court has often held that 'a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error'. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), and cases cited * * *."

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October 31, 1994

APPENDIX

APPENDIX

U.S. Department of Justice

[DoJ LOGO]
BLH:LVSturgill
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Telephone:
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Washington, D.C. 20530

April 14, 1994

Mr. Charles R. Fulbruge III
Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: International Primate Protection League v. Administrators of the Tulane Educational Fund, No. 93-3067 (5th Cir.)

Dear Mr. Fulbruge:

On April 7, 1994, plaintiffs filed a letter seeking to correct a misstatement by plaintiffs' counsel during oral argument of this case. The alleged misstatement concerned the proper legal standard for reviewing the District Court's finding that Tulane is acting under NIH officials with respect to Tulane's care of the monkeys. *See* Opinion at 2 (the Court "finds sufficient facts have now been submitted to establish that Tulane" is a person acting under the Director of NIH with respect to the monkeys).

Defendants file this response because plaintiffs' letter incorrectly states the applicable law. Although the ultimate conclusion regarding whether a case is removable is a legal issue to be reviewed *de novo, Garrett* v. *Commonwealth Mortgage Corp. of America,* 938 F.2d 591,

593 (5th Cir. 1991), findings of fact that relate to jurisdictional issues are reviewed under the clearly erroneous standard. *See MDPhysicians & Associates, Inc.* v. *State Board of Insurance*, 957 F.2d 178, 180-181 & n.2 (5th Cir.), *cert. denied*, 113 S. Ct. 179 (1992); *Williamson* v. *Tucker*, 645 F.2d 404, 412-417 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). The only exception to that rule is when jurisdictional issues cannot be separated from the merits of a case. *See Williamson*, 645 F.2d at 416 & n.10. This case does not present that situation. Whether NIH officials have the right to control Tulane's actions regarding the monkeys is not inextricably intertwined with plaintiffs' state law claims or with NIH's Supremacy Clause and sovereign immunity defenses. Therefore, the Court should review the District Court's factual finding that Tulane is acting under NIH officials with respect to the monkeys under the clearly erroneous standard, and it should review all related legal issues, including the ultimate conclusion about whether the case was properly removed, *de novo*.

We would appreciate it if you could distribute this letter to the Judges on the panel in this case (Fifth Circuit Judges Jolly and Reavley and District Judge Parker, sitting by designation) on behalf of all the Defendants-Appellees.

Thank you for your assistance in this regard.

Sincerely,

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